

Brigham Young University Law School BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1982

Margaret Dooly Olwell, Jane Dooly Gile, Walker Bank and Trust Company, and William H. Olwell, Trustees of a Testamentary Trust Created For and On Behalf of Bonnie Jane Gile, Eleanor Margaret Olwell, and Carol Jane Olwell, (or Their Heirs as Therein Respectively Named and as Their Interests Appear), Continental Bank and Trust Company, Trustee of A Testa-Mentary Trust Under The Will of John H. Dooly (or Heir or Heirs As Therein Named and As Their Interests Appear), and The Ruth Eleanor Bamberger and Ernest John Bamberger Memorial Foundation, a Charitable Corporation v. Thomas C. Clark, Luther I. Clark, E.

Recommended Citation

Response to Petition for Rehearing, *Olwell v. Clark*, No. 17595 (Utah Supreme Court, 1982).
https://digitalcommons.law.byu.edu/uofu_sc2/2564

This Response to Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

M. Clark, W. T. Gunter, Administrator, or John Doe,
Successor Administrator or Representative of the
Estate of Russell G. Schulder, Deceased, and Maude
L. Schulder, Ann Schulder, Russell Graydon
Schulder, His Heirs, and All Other Persons Known
or Unknown Claiming An Interest In The Property,
The Subject of This Action : Respondents' Reply To
Brief On Petition For Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsCliford W. Ashton; Attorney for Plaintiff-RespondentJames A. Murphy and Tel Charlier; Attorneys for Defendant-Appellant

IN THE SUPREME COURT
OF THE STATE OF UTAH

MARGARET DOOLY OLWELL, JANE)
DOOLY GILE, WALKER BANK AND)
TRUST COMPANY, AND WILLIAM)
H. OLWELL, TRUSTEES OF A)
TESTAMENTARY TRUST CREATED)
FOR AND ON BEHALF OF BONNIE)
JANE GILE, ELEANOR MARGARET)
OLWELL, AND CAROL JANE OLWELL,)
(OR THEIR HEIRS AS THEREIN)
RESPECTIVELY NAMED AND AS)
THEIR INTERESTS APPEAR),)
CONTINENTAL BANK AND TRUST)
COMPANY, TRUSTEE OF A TESTA-)
MENTARY TRUST UNDER THE WILL)
OF JOHN H. DOOLY (OR HEIR OR)
HEIRS AS THEREIN NAMED AND)
AS THEIR INTERESTS APPEAR),)
AND THE RUTH ELEANOR BAMBERGER)
AND ERNEST JOHN BAMBERGER)
MEMORIAL FOUNDATION, A CHARI-)
TABLE CORPORATION,)

RESPONDENTS' REPLY TO
BRIEF ON PETITION FOR
REHEARING

CASE NO.
17595

Plaintiffs and Respondents,)

vs.)

THOMAS C. CLARK, LUTHER I.)
CLARK, E. M. CLARK, W. T.)
GUNTER, ADMINISTRATOR, OR JOHN)
DOE, SUCCESSOR ADMINISTRATOR)
OR REPRESENTATIVE OF THE)
ESTATE OF RUSSELL G. SCHULDER,)
DECEASED, AND MAUDE L.)
SCHULDER, ANN SCHULDER, RUSSELL)
GRAYDON SCHULDER, HIS HEIRS,)
AND ALL OTHER PERSONS KNOWN OR)
UNKNOWN CLAIMING AN INTEREST)
IN THE PROPERTY, THE SUBJECT)
OF THIS ACTION,)

Defendants and Appellants)

FILED

DEC 30 1982

TABLE OF CONTENTS

| | Page |
|--|------|
| REPLY TO BRIEF ON PETITION FOR REHEARING | 1 |
| ARGUMENT | 1 |

Cases Cited

| | |
|--|---|
| <u>Olwell v. Clark, Case No. 17595</u> <u>filed November 19, 1982</u> | 2 |
| <u>Betesen v. Call Auto & Equipment Sales, Inc.,</u> <u>645 P2d 684</u> | 2 |

Statutes Cited

| | |
|--|---|
| <u>Article VIII, Section 9, Constitution of Utah</u> | 4 |
|--|---|

Rules Cited

| | |
|---|---|
| <u>Rule 76(a), (b) Utah Rules of Civil Procedure.</u> | 4 |
|---|---|

IN THE SUPREME COURT
OF THE STATE OF UTAH

| | | |
|--------------------------|---|-----------------------|
| MARGARET DOOLY OLWELL, |) | |
| et al., |) | |
| Plaintiffs-Respondents |) | RESPONDENTS' REPLY TO |
| |) | BRIEF ON PETITION FOR |
| |) | REHEARING |
| vs. |) | |
| |) | |
| THOMAS A. CLARK, et al., |) | CASE NO. 17595 |
| |) | |
| Defendants-Appellants |) | |
| |) | |

JAMES A. MURPHY
Attorney for Appellants
Russell Graydon Schulder -
Administrator of the
Estate of Russell G. Schulder,
Deceased.
376 East 400 South, Suite 300
Salt Lake City, Utah 84111

CLIFFORD L. ASHTON
Attorney for Petitioners
50 South Main Street
Salt Lake City, Utah 84101

IN THE SUPREME COURT
OF THE STATE OF UTAH

| | | |
|--------------------------|---|----------------------------|
| MARGARET DOOLY OLWELL, |) | |
| et al., |) | |
| |) | APPELLANTS' REPLY TO BRIEF |
| Plaintiffs-Respondents, |) | ON PETITION FOR REHEARING |
| |) | |
| vs. |) | |
| |) | CASE NO. 17595 |
| THOMAS A. CLARK, et al., |) | |
| |) | |
| Defendants-Appellants, |) | |
| |) | |

The appellants respectfully submit this reply to respondents' Brief on Petition for Rehearing.

Initially the appellants note that the Brief of respondents was in support of its petition for rehearing filed with the Court on December 14, 1982; however, the Order extending time for filing the Brief required that such Brief be filed by December 13, 1982.

Respondents on page two of their Brief state correctly that the respondents only on one occasion asserted an ownership interest in "all" of the claims. Further, respondents concede such deed was erroneous; however, respondents contend that such single erroneous deed recorded in 1962 constituted "notice" to appellants, when numerous deeds both prior and subsequent to such deed asserted only a 1/6th interest of the respondents in the

subject claims. Appellants urge that such convoluted reasoning adds nothing to the petition for rehearing and should be disregarded by the Court.

Respondents argue that the trial Court's decision cannot be reversed unless there is a clear showing of abuse of discretion. Contrarily, the Court in its opinion concluded correctly that the determination of the Court below in its findings of fact that the respondents' conduct constitutes successful adverse possession with adequate notice to co-tenants was inherently a conclusion of law, and where the issue is one of law the Supreme Court is not bound by the conclusion of the trial Court and may determine the question. See Ollwell v. Clark, Case No. 17595, Note 1 filed November 19, 1982, Betesen v. Call Auto & Equipment Sales, Inc., 645 P2d 684.

The principal issue in this case is whether or not the appellants had notice of conduct by the respondents' requisite to give rise to a cause of action so the statute of limitations could begin to run against appellants. The majority of the Court properly concluded that the respondents failed to carry their burden of proof in this regard and, therefore, the appellants need not be put to any negative burden of proof. The Court has not, as the respondents argue, quieted title in the appellants, rather the Court has confirmed the status of the appellants as co-tenants with the respondents in the subject claims.

Finally, respondents seek a modification of this Court's decision to direct the District Court to determine the amount of contribution proportionately due from the appellants to the respondents and upon payment of the amount so determined to quiet title in the appellants.

Although the Supreme Court by virtue of the provisions of Article VIII, Section 9 of the Constitution of Utah and Rule 76(a) and (b) Utah Rules of Civil Procedure, does inherently have the power to order such actions, the respondents respectfully urge that in this instance it should not for the following reasons:

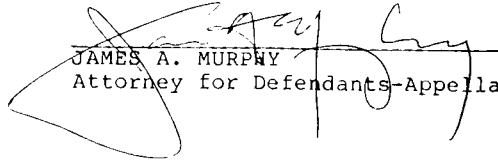
1. The matter of contribution was not raised as an issue before the trial court, nor was it considered on appeal by respondents until filing of their Petition for Rehearing.

2. In their Brief on appeal appellants offered to contribute their proportionate share of taxes due and will so do on rendering of a statement and accounting by respondents.

3. Insofar as quieting title in the respondents after payment, such an order would literally fly in the teeth of the Court's decision since the Court has determined with good cause that the appellants have an undivided 1/6th ownership interest in the subject claims.

Appellants urge that the Respondents' Petition for Rehearing
be denied.

Respectfully submitted this 30th day of December, 1982.


JAMES A. MURPHY
Attorney for Defendants-Appellants